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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 DAVID ZAITZEFF,

11 Plaintiff,

12 v.

13 CITY OF SEATTLE, et al.,

14 Defendants.

CASE NO. C17-184 MJP

ORDER ON MOTION TO
DISMISS: LACK OF STANDING

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16 The Court has received and reviewed:

- 17 1. City of Seattle's Motion to Dismiss for Lack of Standing (Dkt. No. 43) and King
18 County's Joinder (Dkt. No. 44);
- 19 2. Plaintiff's Affidavit re SMC 12A.14.080 for January 2018 (Dkt. No. 47) and
20 Affidavit re RCW 9.41.250 for January 2018 (Dkt. No. 48);
- 21 3. City of Seattle's Reply in Support of Motion to Dismiss for Lack of Standing (Dkt.
22 No. 50) and Dan Satterberg's Consolidated Reply to Plaintiff's Affidavits and in
23 Support of City of Seattle's Motion to Dismiss (Dkt. No. 49);
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1 all attached declarations and exhibits; and relevant portions of the record, and rules as follows:

2 IT IS ORDERED that the motion is GRANTED. Plaintiff's Amended Complaint is
3 DISMISSED for lack of standing; as further amendment would not cure the complaint's defects,
4 the dismissal shall be with prejudice.

5 IT IS FURTHER ORDERED that the remaining pending motions in this matter are all
6 STRICKEN as moot.

7 **Background**

8 This is the second lawsuit Plaintiff has pursued regarding the issues before the Court.
9 Plaintiff's first lawsuit consisted of a facial challenge to the constitutionality of Seattle Municipal
10 Code ("SMC") 12A.14.080 and .083 and RCW 9.41.250, both concerned with restrictions on the
11 carrying or possession of identified weapons. *See Zaitzeff v. City of Seattle, et al.*, No. 2:16-CV-
12 00244-BAT, 2016 WL 6084930 at *1-2 (W.D. Wash. Oct. 18, 2016); *also* Dkt. No. 5, Amended
13 Complaint ("AC"), ¶¶ 1-2. Plaintiff's first lawsuit was dismissed without prejudice for lack of
14 standing on the ground (among others) that the laws to which Plaintiff objected had not been
15 enforced against him, thus he could not plead an actual, imminent or impending injury. *Id.* at *5-
16 *6. That result has been upheld on appeal. *See* 9th Cir. Case No. 16-35955.

17 The present litigation represents Plaintiff's attempt to establish standing with amended
18 allegations. AC at ¶ 1. While the vast majority of his 30 pages of pleadings consist primarily of
19 Plaintiff's opinions and conclusory legal statements, it does allege that Plaintiff "desires to
20 possess and/or carry" any and all of the weapons restricted by SMC 12A.14.080 and .083 and
21 RCW 9.41.250. AC at ¶ 112. He asserts that he has "new facts" which alter the analysis
22 regarding his standing to bring this lawsuit, including allegations that he intended "to carry his
23 katana and/or a fixed blade knife and/or a spring assisted opening knife at the U-district Street
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1 Fair” on May 20-21, 2017. AC at ¶ 13. Plaintiff indicates that he inquired of an SPD officer on
2 February 7, 2017 concerning these intentions and was advised that he could be “cited for the
3 illegal use of weapons” should he appear at the Street Fair carrying those items (and also asserts
4 that he was similarly advised at the 2016 Street Fair). AC at ¶¶ 15-20, 24-25.

5 An initial attempt to obtain a preliminary injunction prior to the 2017 Street Fair was
6 rejected on the grounds that Plaintiff “ha[d] not shown any serious questions regarding the merits
7 of his claim” and that “any injury [he] would face from enforcement of Chapter 12A.14 is
8 speculative.” (Dkt. No. 21.) A visit to the 2017 Street Fair (openly carrying a fixed-blade knife)
9 reportedly resulted in contact from officers of SPD but no arrests or citations. (*See* Dkt. No. 34,
10 Kennedy Decl., Ex. A; an email from Plaintiff entitled “Summary of ‘knife’ weekend.”)

11 Plaintiff has since brought several additional motions, including a “Motion to Rule That
12 [he] has Standing” (Dkt. No. 27), a motion for leave to amend his complaint again to allege an
13 August encounter with SPD (Dkt. No. 39), and a motion for return of his katana (which was
14 seized when he wore it to a political rally in November 2017; *see* Dkt. No. 38) and to further
15 allege financial damages resulting from the seizure. All of those motions have been stayed
16 pending a ruling on the present motion. (Dkt. No. 46.)

17 Additionally, the parties have recently filed a Stipulated Motion for Continuance of
18 Dispositive Motions Deadline and Corresponding Continuance of Trial. (Dkt. No. 51.)

19 Discussion

20 Legal standard

21 In the absence of Article III standing, a federal court has no jurisdiction to adjudicate a
22 plaintiff’s claims. FRCP 12(h)(3) states that “[i]f the court determines at any time that it lacks
23 subject-matter jurisdiction, the court must dismiss the action.” The burden of establishing
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1 standing under Article III falls on Plaintiff. Lujan v. Defs. Of Wildlife, 504 U.S. 555, 561
2 (1992).

3 Establishing standing requires Plaintiff to demonstrate an “injury in fact” that is not only
4 “concrete and particularized,” but also “actual or imminent.” Id. A “conjectural or hypothetical”
5 injury” – one that may happen “someday” – will not support a finding of standing. Id. at 561,
6 564. Critically for Plaintiff’s case, that injury must be present at the beginning of the litigation
7 (Davis v. FEC, 554 U.S. 724, 732 (2008)), either as an “actual” injury or one that is “*certainly*
8 pending” at the time. Lujan, 504 U.S. at 564 n.2 (emphasis in original).

9 The issues presented by Plaintiff’s case is whether standing can be established (1) by
10 reference to an alleged threat of enforcement which never occurred or (2) through allegations of
11 events which occurred following the filing of the complaint?

12 Plaintiff lacked standing at the outset of the complaint and could not later create it

13 Plaintiff’s lawsuit can best be characterized as a “pre-enforcement challenge” – his
14 Amended Complaint contains no allegations that the restrictions to which Plaintiff objects had
15 ever been enforced against him in any fashion. It is the rule in the Ninth Circuit that only by
16 demonstrating “a genuine threat of imminent prosecution” may a plaintiff challenge a statute
17 which has not yet been enforced against him. Thomas v. Anchorage Equal Rights Comm’n, 220
18 F.3d 1134, 1139 (9th Cir. 2000).

19 That “genuine threat” must be established by proof of (1) a “concrete plan to violate the
20 law in question,” (2) a “specific warning or threat to initiate proceedings” by governmental
21 authorities and (3) a “history of past prosecution” under the challenged statute. Plaintiff
22 attempted to establish the first two elements of this test with allegations of a plan to violate the
23 laws in question at the 2017 Street Fair which he had discussed with police officers who
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1 allegedly advised him he could be arrested if he went through with the plan. (AC at ¶¶ 13, 15-
2 25.)

3 Plaintiff's attempt was unsuccessful. His plan to provoke an arrest or citation by open-
4 carrying his weapon at the Street Fair on May 20 or 21, 2017 resulted in no arrests or citations.
5 (See Dkt. No. 34, Decl. of Kennedy, Ex. A, emails from Plaintiff.) His "threat of imminent
6 prosecution" turned out to be purely speculative, with no "injury in fact" or "genuine threat of
7 injury" upon which to establish his standing based on the circumstances at the inception of his
8 lawsuit.

9 "[T]he jurisdiction of the Court depends upon the state of things at the time of the action
10 brought." Keene Corp. v. United States, 508 U.S. 200, 207 (1993). Plaintiffs may not create
11 standing *ex post facto* based on events which post-date the filing of their complaint. See Paradise
12 Creations, Inc. v. UV Sales, Inc., 315 F.3d 1304, 1308-09 (Fed. Cir. 2003)(a plaintiff who lacks
13 standing at the outset of the suit cannot manufacture standing based on events following the
14 filing).

15 Plaintiff, however, has contended that events which occurred in August and November of
16 2017 can be used to bootstrap him into standing to pursue a lawsuit filed in February of 2017.
17 Regardless of whether the later events might create standing for another lawsuit, the Court
18 cannot and will not permit them to be used retroactively in this litigation to cure the defects in
19 Plaintiff's case. Not only would this be a violation of clearly established precedent, but it is
20 against public policy: the Court will not be seen to encourage members of the public (especially
21 ones who are attempting to create constitutional controversy by carrying weapons in public) to
22 manufacture standing by provoking law enforcement into arresting them after they have filed a
23 lawsuit challenging the constitutionality of a statute.
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1 Plaintiff's affidavits contain further assertions of his intent to carry prohibited weapons at
2 future events, and further allegations of conversations with police officers who advised him that
3 they would enforce the statutes if they observed him violating them. It is insufficient. A
4 hypothetical plan or general, unspecified intent to violate a statute at an unknown date in the
5 future does not rise to the level of "concrete plan" that is required. Thomas, *supra*, 220 F.3d at
6 1139. The same can be said of a generalized threat of prosecution (as opposed to a specific
7 warning or threat to commence proceedings). Id.

8 The Court notes that, outside of adding additional allegations of post-filing events and re-
9 asserting his plans to violate one or more statutes, Plaintiff has not responded to Defendants'
10 motion with a single legal theory nor cited a single case in support of his standing to bring this
11 action based on his allegations at the time of filing of his complaint. It is a resounding silence,
12 speaking volumes about the merits of his case when he originally brought it – i.e., the merits
13 upon which Defendants' motion must be evaluated.

14 **Conclusion**

15 Plaintiff's complaint fails to articulate an "injury in fact" or a "genuine threat of
16 imminent prosecution." He will not be permitted to utilize events occurring after the filing of his
17 complaint to backfill the deficiencies in his pleading. Defendants' motion to dismiss will be
18 GRANTED. Because Plaintiff has articulated no means by which the defects in his complaint
19 could be cured through amendment, the dismissal will be with prejudice.

20 In addition to Defendants' motion to dismiss, there were a number of motions from
21 Plaintiff pending at the time this motion came ripe. The motions concerned further attempts by
22 Plaintiff to create a justiciable controversy using events which occurred after the filing of his
23 complaint. As evidenced by this ruling, the attempts are non-meritorious and the remaining
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1 motions will be STRICKEN as moot in light of the dismissal of Plaintiff's complaint. The most
2 recent stipulated motion to continue the dispositive motions deadline and the trial date is likewise
3 unnecessary and will be stricken.

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5 The clerk is ordered to provide copies of this order to Plaintiff and to all counsel.

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7 Dated: February 2, 2018.

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10 Marsha J. Pechman
11 United States District Judge
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